

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GEORGE GARVEY, ADAM BIANCO, : 23-CV-517(KAM)
ANTHONY FIGUEROA, CURTIS :
CUTLER, DALE NICHOLLS, :
DANIEL HULKOWER, FRANK :
CALAMANCO, JAMES GERMANO, : United States Courthouse
KOLA SMITH, MANDEL BAILEY, : Brooklyn, New York
MITCHUM GREENE, PATRICIA :
BUCCELLATO, RALPH MARTINEZ, :
RUSSELL PIAZZA, SEAN ABELL, :
THOMAS LIBRETTI, : Thursday, April 6, 2023
: 12:30 P.M.
Plaintiffs, :
:
-against- :
:

ERIC ADAMS, AND THE CITY OF
NEW YORK,

Defendants.

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TRANSCRIPT OF PRE-MOTION CONFERENCE
BEFORE THE HONORABLE JUDGE KIYO MATSUMOTO

A P P E A R A N C E S:

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1 (In open court.)

2 THE COURT: This is the pre-motion conference for
3 Garvey versus City of New York. 22 civil 517. Plaintiff's
4 counsel, Mr. Chad LaVeglia, has just appeared. And who do
5 we have for the defendant, please?

6 MR. HOLMES: David Holmes from the Office of the
7 Corporation Counsel, your Honor.

8 THE COURT: All right, thank you.

9 Counsel, if I can just ask you please remember to
10 identify yourself when you speak so we know who is speaking.
11 We have a court reporter who is making a transcript of
12 today's conference. So, as you know, the defendants have
13 asked to dismiss the lawsuit. Given that there is a pending
14 previously filed Article 78 proceeding in state court that,
15 except for a few defendants, is identical to the case
16 pending in federal court. And the defense wishes to dismiss
17 because there is not -- it's not appropriate to file two
18 lawsuits and put them on parallel tracks in state and
19 federal court and see which lawsuit yields the results that
20 the parties seek. The defendants make a compelling argument
21 that the article 78 proceeding could have entertained any or
22 all of the claims that are currently pending before this
23 court. The parties. Except for the Department of Health
24 and Mental Hygiene and the commissioner are otherwise the
25 same. And the Second Circuit has held for a long time now

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1 that if claims arised out of the same factual grouping, they
2 are deemed to be part of the same cause of action, and a
3 later claim will be barred in that regard to whether its
4 based on theories or seeks different additional relief.
5 This is versus BMC Mortgage, Inc. 737 Federal Appendix 573.
6 Citing an older Second Circuit case; Davidson versus
7 Kapuana. 792 F.2nd 275 decided in 1986.

8 Now, the other -- in front of you that the
9 defendants have identified is that the selective enforcement
10 theory of the plaintiff's case, if one were to reach the
11 merits, does not state a claim because the Second Circuit,
12 again, requires that there be facts, plausible facts, and
13 ultimately proof that a plaintiff must show that he,
14 compared with other similarly situated, was selectively
15 treated, and the selective treatment was motivated with the
16 intention to discriminate on the basis of race, religion,
17 national origin, sex or some other factor -- exercise the
18 constitutional right and that there be -- bad faith on the
19 part on the defendant's with an intent to injure the
20 plaintiff.

21 So those facts are absent from the complaint. It
22 appears that the plaintiff's, although it's theory it's
23 certainly not supportable by any law that they're comparing
24 private sector to City employees and arguing that private
25 sector employees should constitute a group, a comparative

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1 group. Which, frankly, the law just doesn't support. This
2 claim, if it's to proceed, has to depend on an unequal,
3 selective enforcement based on, as I said, race, religion,
4 etcetera.

5 So let me ask Mr. LaVeglia, would you like to be
6 heard? I got your letter, but would you like to be heard?

7 MR. LAVEGLIA: Yes, your Honor. Chad LaVeglia,
8 again, for plaintiff. I do understand the Res judicata
9 argument if I may address that first. According to Marcel
10 Fashions Group, Inc, the Lucky Brand Dungarees,
11 D-U-N-G-A-R-E-E-S, from the Circuit in 2015 Res judicata
12 does not apply where there's a continuation of the same
13 course of conduct. So here, even though the plaintiffs did
14 prevail in an Article 78 in lower court, Eric Adams
15 continued to enforce the vaccine mandate for months and
16 beyond that date. And so a continuing course beyond the
17 original claim that was in state court.

18 THE COURT: Well, wasn't the state court
19 addressing that issue?

20 MR. LAVEGLIA: Well, it couldn't have been
21 addressed because the conduct occurred after. After the
22 Court made the ruling, the Mayor still continued to enforce
23 this vaccine mandate.

24 THE COURT: Well, let me ask you. Did all of the
25 plaintiffs lose their jobs because of their vaccine mandate

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1 or did they invoke any of the procedures that were typical
2 of other municipal employees?

3 MR. LAVEGLIA: Well, the lower court or the state
4 court ordered the City to reinstate them, but the City
5 appealed, and pursuant to the CPLR, there's no automatic
6 stay on that portion of the order.

7 THE COURT: Well, there's no reason for me to go
8 forward if that case is that far along.

9 MR. LAVEGLIA: I understand, your Honor.

10 THE COURT: I mean, it just it's not appropriate
11 for plaintiff's to go to two different forums; state and
12 federal, and proceed along parallel tracks. You first chose
13 state court, you got a good result there, you're waiting an
14 appeal. But the federal court is not going to step into the
15 middle of a state court adjudicated matter. Or assert its
16 jurisdiction. I don't think it would be appropriate when
17 there is a pending appeal.

18 MR. LAVEGLIA: I happen to agree, your Honor.

19 THE COURT: Well, I'll hear from the defense
20 because they can -- this is their motion. And I'm happy to
21 hear from them.

22 MR. HOLMES: David Holmes from the Office of the
23 Corporation Counsel. With regard to the claim of a
24 continuing violation, the defendants believe that does not
25 hold merits for the very reasons that were offered by the

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1 plaintiff's, which is, that when the case was appealed,
2 results in statutory stay in the reinstatement process as
3 portions of the order. Which is why there would have been a
4 continuation of the enforcement of such a mandate. So it
5 would have been as a result of that appeals process. And
6 there should not be considered a continuing violation.

7 Moreover, the case cited by plaintiffs involved an
8 instance in which both parties settled and come to a
9 complete resolution, and then the violations continued. In
10 this case, we are still ongoing in litigation by both the
11 plaintiff and your Honor.

12 THE COURT: You're saying that Marcel Fashions
13 Group caved? Is that the one you're referring to as having
14 reached a settlement?

15 MR. HOLMES: Yes. That was my understanding, your
16 Honor.

17 THE COURT: All right. So Mr. LaVeglia, you have
18 to -- I just want to ask you how you want to proceed? I
19 don't know whether there are any facts that you can allege
20 regarding the claim that the City took selective, you know,
21 enforcement against you. Your clients. Are there any
22 facts? I mean, do you want to amend your pleading to see
23 if you can put facts in that would make out an equal
24 protection claim based on race, religion, gender, you know.

25 MR. LAVEGLIA: Well, if I may, your Honor. I do

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1 think that there is a strong case for the selective
2 enforcement. I mean, we're talking about a virus that was
3 present everywhere that public people gathered or people
4 gathered in public. I mean, the Supreme Court in NFIB V.
5 OSHA acknowledged that. That places of employment are not
6 any different than any other public place and they shouldn't
7 be treated any differently. And by making or ordering just
8 city employees to get vaccinated, and only city employees,
9 it's irrational and arbitrary. And then taking away their
10 livelihood is evidence of bad faith. I mean, the Mayor is a
11 lifelong public servant. He knows that these are careers.
12 They're not just temporary jobs.

13 THE COURT: Sir, I understand the argument and
14 it's a sympathetic one, but I'm talking about the law.
15 Equal protection requires that the law is being applied and
16 based on and because of race, religion, sex, national
17 origin, etcetera.

18 Do you want an opportunity to amend your pleading
19 to make out facts regarding an appropriate equal protection
20 action?

21 MR. LAVEGLIA: Your Honor, I don't think so
22 because I believe that it would be improper for me to
23 proceed forward, considering the strength of the Res
24 judicata conduct.

25 THE COURT: So are you saying you're going to

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1 dismiss this case?

2 MR. LAVEGLIA: Yes. I don't believe there would
3 be a good faith basis to go forward, considering the
4 strength of the res judicata, and the state proceedings are
5 ongoing. And as counsel said, and correctly so, there was
6 an automatic stay. So even if it was continuous, it doesn't
7 really matter. Because the Mayor was not bound by the -- as
8 a result of the automatic stay.

9 THE COURT: Did they rescind the vaccine mandate
10 some time ago?

11 MR. LAVEGLIA: He did in, I believe it was
12 February. The beginning of February.

13 THE COURT: Okay. And was the case already stayed
14 by then?

15 MR. LAVEGLIA: Yes, your Honor.

16 THE COURT: All right. So if I -- if you are
17 going to withdraw your case in the federal court and proceed
18 in state court, I think what I'd like to do is either get
19 your consent on behalf of all of your clients that you're
20 dismissing this case with prejudice. Because you have a
21 pending state court case. Or if you get a stipulation, but
22 I think your -- some of your clients are on the phone. I
23 don't know which ones. I know at least one gentleman did
24 identify himself. But my point is is that you do have the
25 ability to authorize the dismissal. But I want to make sure

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1 that your clients have cleared with you and given your
2 permission to dismiss the federal case with prejudice.

3 Can you make that representation to me as an
4 officer of court?

5 MR. LAVEGLIA: I cannot at this moment. I would
6 like to speak with them first, if I may.

7 THE COURT: All right, that's a good idea. So
8 let's do this. I will order that you talk to your clients,
9 the main plaintiffs here. George Garvey, Adam Bianco,
10 Anthony Figueroa, Curtis Cutler, Dale Nicholls, Daniel
11 Hulkower, Frank Calamanco, James Germano, Kola Smith, Mandel
12 Bailey, Mitchum Greene, Patricia Buccellato, Ralph Martinez,
13 Russell Piazza, Sean Abell, and Thomas Libretti.

14 As an officer of the court, if you get all of your
15 consent to dismiss, you should represent that in a
16 stipulation of dismissal that you are dismissing on behalf
17 of all the plaintiffs. Alternatively, if the defense wants
18 this, each of the named plaintiffs can sign the stipulation
19 of dismissal with you also. On the stip about that.

20 So let me ask Mr. Holmes: What would you feel
21 most comfortable with at this point?

22 MR. HOLMES: Yes. David Holmes from the Office of
23 The Corporation Counsel. So I think it would be probably
24 most efficient if plaintiff's counsel could speak to all of
25 his clients and if then issue one singular stipulation to

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1 the Court. But we're happy to get all of the signatures of
2 all of the plaintiffs, if that happens to be more efficient.

3 THE COURT: Usually when an attorney appears for a
4 client and would takes any action his or her behalf, his
5 actions will bind the client. But I want to make sure that
6 all of the plaintiffs understand that this federal case will
7 be dismissed with prejudice. Meaning, you can't come back
8 to federal court with this claim because you've got
9 identical claims pending in the state court and you
10 succeeded. So all right. Were you going to say something,
11 sir?

12 MR. LAVEGLIA: Sorry, Chad LaVeglia for plaintiff.
13 I would be able to speak with everybody and we've all been
14 on the same page, so when I explain it to them, I would be
15 able to get their individual consent.

16 THE COURT: All right. So let's ask that you
17 submit stipulation of dismissal no later than -- and then
18 Mr. Holmes will have to sign it as well. How much time do
19 you need? A week or two?

20 MR. LAVEGLIA: A week, your Honor.

21 THE COURT: Just one week, all right. I'm giving
22 you until Friday, April 14th. Is that all right?

23 MR. LAVEGLIA: Yes, your Honor.

24 THE COURT: So stipulation of dismissal will be
25 submitted with prejudice by Friday, April 14th. All right.

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1 All right. Thank you. And Mr. Holmes, you should
2 also keep track just to make sure that you get that stip in
3 time so that it can be uploaded to the docket by the 14th.

4 MR. HOLMES: Yes, your Honor.

5 THE COURT: All right. Thank you, counsel. And
6 thank you for all of the plaintiffs that joined us today.
7 Have a good day.

8 (Proceeding concluded.)
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